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Supreme Court, U.S.
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No. 01-851

IN THE

SUPREME COURT OF THE UNITED STATES

DEBORAH S. PALAC,

Petitioner,

v.

GARY R. SMITH and PRECISION ELECTRIC, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITIONER'S REPLY MEMORANDUM

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8 pp

QUESTION PRESENTED

Whether the Due Process Clause of the Federal Constitution prohibits a state court from applying procedural rules in a manner that, without fair notice, deprives a plaintiff of her opportunity to appeal on a state law claim?

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I. The United States Supreme Court has certiorari jurisdiction to review the state court's decision in this case.

The Respondents, in their Brief in Opposition, have set forth an erroneous argument that the Petitioner's federal question has not been properly raised in the United States Supreme Court and that review must, therefore, be declined.

However, this Court has decided in a series of cases that as long as the highest state court holds or assumes that a specific federal question is properly before it, and then expressly proceeds to consider and determine that issue, the federal question is considered to have been properly preserved and raised for this Court's review. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Franks v. Delaware*, 438 U.S. 154, 161-62 (1978).

The Petitioner specifically presented the question of whether her due process rights had been violated at pp. 10-11 of her Memorandum in Support of Jurisdiction filed and considered in the Supreme Court of Ohio. In her Proposition of Law No. 2 she stated that:

> A clearly captioned motion for remittitur, served within the time constraints of Civ. R. 59(B), cannot be judicially redacted to its termed "true nature" when such a construction operates to prejudice or eliminate the constitutional protection of due process of law provided under the Fourteenth Amendment, Section 1 of the Constitution . . . .

Furthermore, in the first paragraph thereunder, the Petitioner stated with particularity that:

> Citizens of the United States of America . . . are guaranteed the protection of due process of law. The Fourteenth Amendment of the Federal Constitution declares that no state shall deprive any person of life, liberty, or property without due process of law, and constitutes a limitation upon the powers of the states. . . . The appellant, however, was denied the protection of due process of law, as well as proper notice, when the court of appeals looked to what it termed the "true nature" of appellees' motion for remittitur and thereby dismissed appellant's notice of appeal as being untimely.

The Supreme Court of Ohio proceeded to dispose of this issue on the merits and determined that the appeal did not involve any substantial constitutional question. (App. 1a). Though unfavorable, this decision unquestionably preserved the certiorari jurisdiction of the United States Supreme Court. *Payton v. New York*, 445 U.S. 573, 582 n. 19 (1980).

In fact, the Respondents confirm that the Petitioner did present the precise question of whether her due process protections had been denied, and that that issue was decided in the highest state court. At pp. 4-5 of their Brief in Opposition, Respondents state:

> [T]he Supreme Court of Ohio was presented with petitioner's constitutional challenge to the decisions of the lower Ohio state courts. Ultimately, the Supreme Court of Ohio considered the very argument advanced by petitioner in this case and rejected that argument determining that no substantial constitutional question was presented.

> Although petitioner now cites different legal authority in support of her claim, that authority is really no different than what was considered by the Supreme Court of Ohio . . .
>
> .

Since it is clear that the highest state court has ruled on the Petitioner's federal question regarding her due process interest, any inquiry into when or how the question was raised in the lower state courts is irrelevant to the exercise of this Court's certiorari jurisdiction. An irrebuttable presumption has been created of a timely and properly raised federal question. *Charleston Fed. Sav. & Loan Ass'n v. Alderson*, 324 U.S. 182, 185-86 (1945).

II. The Petitioner's case is of general importance for all states and has genuine constitutional significance.

The Respondents take out of context the Petitioner's argument regarding the conflict of decisions among the states when utilizing a substance and form analysis, by stating that this is an illusory split and merely involves a question of how state court law is applied. This understanding misses the point.

The issue that the Petitioner seeks to apprise this Court of is a citizenry faced with inconsistent applications of state-by-state versions of substance and form analyses that may be used to rout established rules of civil and appellate procedure, and thereby confer lesser due process rights than that guaranteed by the Federal Constitution. U.S. CONST. amend. XIV, § 1.

It is significant that many, if not most, of the Bill of Rights' provisions are procedural in nature. This Court has stated that "[t]he history of American freedom is, in no small measure, the history of procedure." *Malinski v. New York*,

324 U.S. 401, 414 (1945) (separate opinion). Although procedural due process means different things in different instances, strict adherence to the standards of due process "often operates to prevent erroneous decisions on the merits from occurring." *Silver v. New York Stock Exch.*, 373 U.S. 341, 366 (1963).

Therefore, the legal issue presented in this case is one that has general importance for all states because all states have their own rendition of a substance and form analysis that can be applied in an ad hoc manner that affects whether people know when an interest of the Due Process Clause is triggered by different procedural rules.

CONCLUSION

This case presents a significant due process issue and plenary review of the action below is in order. The Petitioner respectfully requests that this Court grant a writ of certiorari to review the entry of the Supreme Court of Ohio.

Respectfully submitted,

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